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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 470 24

ALTHEA G. WILLIAMS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

JUDGMENT SOUGHT TO BE REVIEWED.

Petitioner Althea G. Williams respectfully petitions for writ of certiorari to review the judgments against her in the United States District Court,

Northern District, Southern Division, and in the Ninth Circuit Court of Appeals. The opinions are reported, respectively, in 105 Fed. Supp. 208 and 215 Fed. (2d) 800. Copies are appended.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed was entered on September 8, 1954. No rehearing was requested, nor was any extension of time sought within which to petition for certiorari.

Jurisdiction to review the judgment in question is conferred upon this court by 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. May a soldier be "acting in line of duty" within the meaning of the Federal Tort Claims Act where he seeks personal recreation going to and from an overseas governmental recreational facility; is given a pass, an Army vehicle and trip ticket therefor in accordance with a long-established Army practice, even though the practice may violate an Army regulation?

2. Do federal law and federal administrative regulations, or the law of the place where an alleged tort is committed, apply in determining whether a member of the armed forces is "acting in line of duty" within the meaning of the Federal Tort Claims Act?

3. Was the term "acting in line of duty" intended by Congress to restrict federal liability under the Federal Tort Claims Act to a smaller area of liability than that of a private individual under normal principles of respondeat superior?

4. Since the sole evidence on the issue of scope of employment was documentary, may this Court review the evidence and make its own determination of that issue?

STATUTES INVOLVED.

The statutes involved herein are as follows:

28 U.S.C. § 1346, 62 Stat. 933, Amended 63 Stat. 62, 63 Stat. 101:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C., Sec. 2671, 62 Stat. 982, amended 63 Stat. 106:

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

28 U.S.C., Sec. 2674, 62 Stat. 983:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE.

This action was brought by petitioner in the District Court of the United States, Northern District, Southern Division, under the Federal Tort Claims Act, 28 U.S.C., Secs. 1346, 2671, et seq.

At the time of the alleged tort, petitioner was a civilian employed as a part-time teacher by the Army Air Force on Guam. On the night of March 3, 1949 at about 10:30 p.m. while she was sitting in a vehicle parked near a beach area on the Island, an army vehicle crashed into the side of petitioner's car, causing painful, serious and permanent physical injuries to her.

The driver of the army vehicle was one Corporal Seabourn stationed on Guam as a supply clerk with an Army service detachment.

The evidence on the issue of scope of employment consisted entirely of written interrogatories and docu-

mentary evidence. It showed that at about 8:00 a.m. on March 3, 1949, Seabourn and two other soldier buddies, Sergeant Vincent and Pfc. Schmidt, went on pass to a tavern about a mile from their station and spent most of the morning. In the afternoon, the three hired a cab and went about the town of Agana until 6:30 p.m. when they returned to the base.

At 8:00 p.m. Seabourn went to Sergeant Stiles of his company and obtained an official "trip ticket" for a ¾ ton weapons carrier. The trip ticket was good for that vehicle until 9:30 a.m. the next day.

A certified copy of the trip ticket was introduced in evidence. It shows that it was made out to one Cabrera, at the request of a Lt. Werb, for official business. Both Seabourn and his companion, Schmidt, testified, however, that once a vehicle had a trip ticket, it could be and was the long standing Army practice to be used for either "official business" or recreation", and that it was common practice for trip tickets to be passed around among the men working in their supply section, regardless of the name of the person to whom the ticket had been issued. They testified that all the officers and enlisted men in Seabourn's unit followed the practice, and that the practice had prevailed for at least fifteen months prior to the accident.

By means of this trip ticket, Seabourn secured possession of the vehicle and his two companions then drove for recreation to the Enlisted Men's Club on the Island. There they had more drinks and decided to go for a ride. Thereafter, and prior to the acci-

dent, Seabourn let his companions out of the vehicle and drove off alone.

The trial court held, apparently as a matter of law, (105 Fed. Supp. at 209), "Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable." The court found that Seabourn's use of the weapons carrier was not for the purpose of transporting United States Army personnel under the direction of his commanding officer, nor for any purpose authorized by army regulations; that Seabourn was on a frolic of his own and used the vehicle as he might use his private automobile in seeking personal entertainment. Judgment went for defendant.

Petitioner duly appealed to the Ninth Circuit Court of Appeals. Petitioner there claimed, as she did in the trial court, that the decision in *Murphey v. U. S.*, 179 F. (2d) 743 (9th Cir. 1950) cert. den., was determinative of the issue whether Seabourn's pursuit of personal pleasure with the government provided facility may be activity within the scope of employment. Petitioner's argument was summarily rejected.

REASONS AND ARGUMENT FOR ISSUANCE OF WRIT.

I. THE COURT OF APPEALS HAS RENDERED AN ERRONEOUS DECISION ON IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND IN CONFLICT WITH THE EXPRESS TERMS OF THE FEDERAL TORT CLAIMS ACT.

A. The Court of Appeals' opinion unduly limits the statutory definition of scope of employment of members of the armed forces.

The most vital and compelling reason for the issuance of the writ of certiorari to the Court of Appeals arises from that part of its opinion called "The Respondeat Superior Doctrine". For several pages the Court of Appeals embarks upon a novel and erroneous theory of federal liability under the Federal Tort Claims Act. Petitioner contends that this theory so woven into the decision below requires a review and reversal.

The position of the Ninth Circuit is that the definition in Sec. 2671 of the Act (that course of employment means "acting in line of duty" with respect to soldiers) was intended by Congress to relieve the government of liability in situations where private employers in similar situations would nevertheless be liable. For example, the court states that this definition "provides a clear line of demarcation between government liability for a soldier's torts and the area of general liability of a private employer * * *" Congress, according to the Ninth Circuit, sought by this definition "to adopt a drastic modification of this 'master and servant' doctrine." (p. 807.)

Petitioner contends that this theory is the first judicial attempt to controvert the express terms of

the Act, which provides: "The United States shall be liable respecting the provisions of this title relating to tort claims *in the same manner and to the same extent as a private individual under like circumstances,* but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C., Sec. 2674.

This position of the Ninth Circuit also conflicts with numerous cases in other jurisdictions. In fact, it conflicts with one of the very cases cited by the court, *U. S. v. Campbell,* 172 Fed. (2d) 503 (5th Cir. 1949), wherein that court stated: "The very heart and substance of the act is to be found in the words 'scope of his office or employment' not as appellee would read them when wrenched out of their context but as they are precisely limited in it *to the circumstances where the United States, if a private person, would be liable* to the claimant and *in accordance with the law of the state where the injury occurs.*" This rule is repeated in *Costley v. U. S.,* 181 Fed. (2d) 723 (5th Cir. 1950); *Hubsch v. U. S.,* 174 Fed. (2d) 7 (5th Cir. 1949).

The importance of the position taken by the Ninth Circuit becomes acute when liability in the instant case is analyzed under normal master-and-servant principles. These principles obviously were intended by Congress to be applied in determining the issue of scope of employment when it provided in Sec. 2674 that the government should be liable "in the same manner and to the same extent as a private individual *under like circumstances.*"

Normally the issue of scope of employment is determined by considering the "circumstances" surrounding the tortious act. Thus, as set forth in Restatement of Agency, Sec. 229, it is important to consider many factors, among them whether or not the act is *commonly* done by such servants, the time, place and *purpose* of the act, the previous *relations between the master and servant,* whether or not the instrumentality by which the harm has been done was furnished by the master to the servant and other factors. Under normal Agency Law, even forbidden and criminal acts may be within the scope of employment. *Rest. Agency,* Secs. 230, 231.

But turning to the opinion of the Court of Appeals we find the court apparently holding that at the very time and place of the alleged tort a soldier must actually be acting under the authority or direction of a superior officer, *and all within the framework of Army Regulations.* This is apparent when the opinion is inspected to determine upon what factors the court grounds its novel discussion of federal liability under the doctrine of Respondeat Superior. The court, in attempting to distinguish the *Murphey* and *Johnson* cases (pp. 805, 806) from the case at bar, relies on the fact that there was an absence in those cases of evidence of drunk driving. Does this mean that if a soldier violates an Army regulation by driving while drunk he may not be acting within the scope of employment? The court erroneously states that appellant's position was based on the assumption

that "Seabourn was actually indulging in an authorized and permissible form of recreation" *at the time* he crashed his Army vehicle into appellant's car. No private employer authorizes a servant to commit negligence; yet private employers every day are held liable therefor. Most important, however, is that the appellate court, as well as the trial court, refused to consider the effect of what they called a "loose Post practice" of passing around trip tickets for personal recreation. The court merely states that this practice was a violation of an Army regulation. Certainly this practice would be one of those circumstances set forth in *Restatement of Agency,* Sec. 229, namely, whether or not the act is one *commonly* done by such servants, or previous relations between master and servant. The court also facetiously and erroneously states appellant's position that "Seabourn's night ride while drunk was a morale builder, hence the government is liable in damages for the tortious act resulting from that exploit." Appellant's position is, to the contrary, that the "circumstances" of this case permit of liability under Respondeat Superior not because Seabourn was authorized to drive while drunk, but because the act of driving for *recreation* was an act "done commonly by such servants", because the instrumentality by which the harm was done was furnished by the master to the servant and because of other factors mentioned in *Rest. Agency,* Sec. 229. The Ninth Circuit refuses to apply these normal rules. Apparently only if the tortious act is authorized may the government be liable. This error should not stand.

B. The Court of Appeals erroneously holds that federal laws and regulations are to control in determining whether a soldier is "acting in line of duty", whereas the Act requires that the issue of "scope of employment" is to be determined by the law of the place where the tort occurs.

The Federal Tort Claims Act explicitly provides that the issue of "scope of employment" is to be determined by the law of the place where the tort occurs. See 28 U.S.C., Secs. 2674 and 1346. As a corollary of its restriction of federal liability, under Respondeat Superior, the Court of Appeals however holds that the question of whether a member of the armed forces is "acting in line of duty" is to be determined by *federal* laws and regulations. Such is the apparent basis for the court's refusal to consider the effect of petitioner's evidence that, while possibly in violation of army regulations, Corporal Seabourn followed the usual channels and procedure in seeking personal recreation at an enlisted men's club by (1) obtaining an official pass for recreation, (2) obtaining the usual military vehicle trip ticket, (3) obtaining the vehicle from the motor pool, and (4) checking out at the dispatcher's office when he left the base. Finding that this procedure and custom violated an army regulation, the court refused to consider these factors in determining whether Seabourn was acting in the course of his military employment, or, considering the violation, finds that it is conclusive on the issue. This position in effect means that whenever a case involving military personnel arises under the Federal Tort Claims Act, the liability of the government shall be determined by what is to the particular plaintiff a fortuitous fact, that is,

whether or not the serviceman is performing an act which has or has not as yet not been covered by a regulation, regardless of the governmental purpose being served or of the right of control. No matter what might be the course of the soldier's employment *in fact,* the government may be held free of liability because an administrative agency has had the forethought to enact regulations bounding the scope of his employment by *fiction.*

The danger and inequity of this doctrine is amply illustrated by two recent cases in other jurisdictions. In *Watt v. U. S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954) a national guard company's "unit administrative assistant" drove a truck to the headquarters of a U. S. Property and Disbursing Office for the purpose of delivering to him clothing formerly issued to the company and to draw additional supplies and equipment. This was obviously a governmental purpose. His passenger was the "unit caretaker" of the company. Both were sergeants first class. Had the passenger been driving the truck, there would have been no question but that he was acting within the scope of his employment. However, the court found that certain compartmentalizing regulations of the army prescribed different administrative duties for the driver. The Assistant Adjutant General for Arkansas testified, nevertheless, that the duties of an "administrative assistant" and "unit caretaker" customarily overlapped *in practice.* (But the court held that the *regulations* were the boundaries of the driver's scope of employment, that the usage and cus-

tom of the driver's unit would not extend the scope of the driver's employment. In *McConville v. U. S.,* 197 F. (2d) 680 (2d Cir. 1952) a result was reached quite opposite to the result reached by the Ninth Circuit below, and yet there were very similar facts. In that case the government proffered testimony that the driver of the army truck had procured the truck for the purpose of drinking beer off the base which he did do. The court held the testimony immaterial noting that "proper authorization for a trip whose *claimed* purpose was permitted by *regulations* was all that needed to be established." (p. 684.) (Emphasis added.) In other words, the driver had procured a "proper" trip ticket for what must have been an improper and non-governmental purpose. Thus we have the rather ridiculous comparison of the case at bar, where the tortfeasor was acting honestly, in accordance with long established usage and custom, and the *McConville* case, where the tortfeasor used fraud in securing a "valid" trip ticket. In the former case, the Court of Appeals has found no liability. In the latter case the court holds that this fraudulent intent is immaterial!

Making governmental liability dependent upon federal law and regulations is not only illogical and unfair but also conflicts with decisions of other courts of appeals. Thus in *U. S. v. Campbell,* 172 F. (2d) at 502, the appellee attempted to claim that the opinions of the Attorney General and rulings of the Judge Advocate General given in connection with claims of military personnel against the government, and which

construed the phrase "line of duty", had *broadened* the meaning of "acting in line of duty" *beyond* the liability of a private employer and that the court was bound to follow this broadened federal definition. The court expressly disapproved this argument and held that the government, in accordance with the terms of the statute, shall be liable *in the same manner and to the same extent as private persons under the Doctrine of Respondeat Superior.*

This Court should resolve the conflict as to what law is to be applied in determining the issue of scope of employment of members of the armed forces. The Court of Appeals, through the guise of construction, should not be permitted to establish judicial precedent directly contrary to the express provisions of the Tort Claims Act. The Congress, in waiving immunity, should not, in one breath, be said to have waived liability, and then have permitted administrative agencies, through fictional regulations, to clothe the government with immunity. The rights of future plaintiffs should not depend upon the fortuitous wording of administrative regulations.

II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SO FAR SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The Court of Appeals misstates or misconstrues petitioner's argument and authorities.

Rarely can a litigant complain that the accepted course of judicial proceedings has not been followed by a trial or appellate court. Petitioner, however, feels that the opinion of the Ninth Circuit demonstrates such a non-judicious attitude toward an aggrieved party as to call for this Court's supervisory power.

The whole tenor of the opinion is of a facetious and arbitrary dismissal of petitioner's argument. It is replete with the evasive forensic device of argument *reductio ad absurdum*. For example, the court, erroneously, states that the basis of petitioner's argument is that "Seabourn was actually indulging in an authorized and permissible form of 'recreation' at the time he crashed his army vehicle into appellant's car," and that "appellant's view is that Seabourn's night ride while drunk was a morale-builder, hence the government is liable in damages for the tortious act resulting from that exploit". An appellate court should not be permitted to support its own opinion by misstating the losing party's argument.

Petitioner feels that the court must either have failed adequately to analyze petitioner's argument and its own precedent or must have emotionally fled from

normal judicial decorum. In either event, this Court should review the opinion.

PETITIONER'S ARGUMENT HAS BEEN CONSISTENTLY BASED UPON THE RULE OF *MURPHEY v. U. S.*, 179 F. (2d) 743, DECIDED BY THE NINTH CIRCUIT, AND, SIGNIFICANTLY, DISSENTED IN BY THE JUDGE WHO WROTE THE OPINION BELOW IN THE INSTANT CASE. THE *MURPHEY* CASE HOLDS THAT IMPROVEMENT OF MORALE IS A PARAMOUNT MILITARY AND GOVERNMENTAL PURPOSE AND THAT WHERE A PARTICULAR SOLDIER PURSUES THAT OBJECTIVE AND SEEKS RECREATION AND RELIEF FROM THE ISOLATION AND MONOTONY OF HIS POST, WITH AN ARMY VEHICLE, HE MAY BE ACTING WITHIN THE SCOPE OF HIS MILITARY SCOPE OF EMPLOYMENT.

Petitioner claims that proof of authority to seek personal recreation with an army vehicle was ample in the case at bar. This proof lies in the so-called "loose post practice" ignored by the courts below. In other words, the furnishing of the army vehicle to Corporal Seabourn for recreation and the corporal's use therefor was an act in furtherance of this paramount military and governmental purpose.

Petitioner does not claim, as the Court of Appeals says she claims, that the corporal's drunk-driving was authorized, nor that at the time and place of the accident the corporal had "a 'right' to 'keep up his

morale' by negligently or wilfully destroying the rights of others" (in the language of the Court of Appeals). Petitioner does claim, however, in accordance with general master-and-servant law, that the doing of an authorized act in a wrongful or prohibited manner will not preclude responsibility of the employer. *Restatement of Agency,* Sections 229, 230; *Fields v. Sanders,* 29 Cal. (2d) 834, 839; *Haworth v. Elliott,* 67 Cal. App. (2d) 77, 81; *Hiroshima v. P. G. & E. Co.,* 18 Cal. App. (2d) 24. There therefore is little reason for the mock surprise at petitioner's argument which one finds running throughout the opinion below.

B. The Court of Appeals fails to apply and give effect to its own precedent upon which petitioner's argument and case is based.

A strange aspect of the opinion below is that it was written by the dissenting judge in the *Murphey* case, and he takes it upon himself to "distinguish" that decision. The concurring judge was not a signatory to the *Murphey* case.

The alleged distinctions which the dissenting judge in the *Murphey* case finds between the case at bar and the *Murphey* case illustrate the advocate attitude of the court. Petitioner can believe only that the learned judge failed to analyze the facts of that case and the reasons for the decision of the majority. Certainly, he did not like it.

The learned judge asserts these distinctions: Unlike Corporal Seabourn, the army driver in the *Murphey* case was acting under "specific authorization of his

commanding officer", to take the truck into town "for pleasure under instructions" for "entertainment, movies, etc.", and that the majority of the court thought that the "official permission" thus granted was broad enough to include a visit to an Indian dance being held a short distance outside of town, and that this "digression" to the place of the dance was with knowledge of his superior officers. The judge says, "it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence".

The facts omitted by the learned judge below are that the *Murphey* case truck driver visited a *saloon,* and *then* started in the truck for the Indian ceremonial, *on the way meeting two lady friends who boarded the army vehicle.*

The trial court in the *Murphey* case found that "special permission was required to use the vehicle for the pleasure of the men to go to any place other than Klamath", and that the truck driver was not authorized to operate the motor vehicle for his or his companion's personal use or for any other use than that of driving the truck to the town of Klamath and parking the vehicle by the side of a building. The appellate court in the *Murphey* case, however, looked to testimony that there had been at prior times permission to use the truck for recreation in places of short distances outside of Klamath, which had been done with the knowledge of the truck driver's superior officer and that no permission was needed to drive it

to the Indian ceremonial. Is this not evidence of custom and usage?

The appellate court in the *Murphey* case held the government liable because the truck was used for the "broad purposes" of seeking "entertainment and movies, etc.", even though the truck driver had instructions that he was not free to use it in a particular manner accomplishing that purpose. The court below seeks to find some distinction in the fact that in the *Murphey* case the overriding "specific" purpose was the importance of the morale of soldiers in seeking "entertainment, movies, etc.". The court felt that the term "movies, etc." included the Indian ceremonial and that the truck driver in driving to the Indian ceremonial was seeking "specified entertainment". Petitioner contends that this is a distinction without a difference. The testimony in this case was that the soldiers on Guam were authorized to use army vehicles for "recreation". Petitioner can find no distinction between "entertainment" and "recreation", or "movies, etc." and "recreation". Corporal Seabourn was seeking, specifically, "recreation".

The opinion below relies on a statement in the *Murphey* case that the truck driver's superior officer knew that as incidental acts the truck was employed to reach places of entertainment outside of Klamath. But there likewise is testimony in this case that the use of army vehicles for "recreation" had been a long established practice indulged in by all members of Corporal Seabourn's post, officers included. It is a

certainty that Corporal Seabourn's superior officers likewise knew of this long established custom.

It therefore appeared and still appears to petitioner that no honest distinction exists between the *Murphey* case and the case at bar. YET WE FIND A DISSENTING JUDGE FAILING TO APPLY A DIRECT PRECEDENT OF HIS OWN CIRCUIT AND IN EFFECT ADOPTING HIS OWN DISSENT AS THE LAW FOR THAT CIRCUIT WITHOUT OVERRULING THE PREVIOUS DECISION. Certainly this is improper judicial procedure and should not be condoned by this Court. Future litigants are entitled to know whether or not the *Murphey* case or this case is the law of the Ninth Circuit. Unlike petitioner herein, they should not have to find out at their own risk.

Wherefore, your petitioner prays that a writ of certiorari issue to the Court of Appeals for the Ninth Circuit, to the end that the errors aforesaid may be corrected by this Court.

Dated, San Francisco, California,
November 29, 1954.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Petitioner.

(Appendices A and B Follow.)

Appendix A

In the United States District Court for the Northern District of California Southern Division

No. 28,870-E

Althea G. Williams,
Plaintiff,
vs.
United States of America,
Defendant.

Action under the Federal Tort Claims Act for damages for personal injuries. Judgment for defendant, in accordance with opinion.

Henry C. Clausen, San Francisco, California, attorney for the plaintiff.

Chauncey Tramutolo, United States Attorney; Rudolph J. Scholz, Assistant United States Attorney, both of San Francisco, California, attorneys for the defendant.

Memorandum Opinion

ROCHE, Chief Judge: Plaintiff has brought this action under the Federal Tort Claims Act, 28 U.S.C.

921, to recover damages for injuries sustained through the negligence of an intoxicated soldier. The negligence and plaintiff's injuries are not disputed by the defendant. The sole question for decision is whether the soldier was acting within the course and scope of his employment within the purview of the Tort Claims Act. Its determination requires a careful examination of the facts, as disclosed by the record. From the evidence of defendant's witnesses, all of whom testified by deposition, the following facts appear.

The accident occurred on the evening of March 3, 1949, on the island of Guam. Plaintiff was sitting in a vehicle which was parked at the end of the Breakwater road at the little town of Agana when it was struck by a weapons carrier driven by one Seabourn, a Corporal in the United States Army. Seabourn's regular duties were as clerk in supply. He testified that he did not work on the day in question but had taken time off and stayed around his base until about noon, when he left on a pass with Cpl. Benson and Pvt. Schmidt of his company. After spending the afternoon drinking beer they returned to the base about seven p.m. and Seabourn picked up a trip ticket for the weapons carrier. (A trip ticket is authorization from a unit Commander to use a particular vehicle on official business.) Accompanied by Benson and Schmidt, he drove to the Enlisted Men's Club, where they indulged in champagne as well as beer, and then decided to take a ride. At some time prior to the accident, Seabourn let both friends out of the vehicle and he testified that that was the last he re-

membered until the following morning when he awoke beside the road.

A certified copy of the trip ticket was introduced in evidence. It shows that it was made out to one Cabrera, at the request of Lt. Werb, for official business and was good for 24 hours. It further shows that the vehicle was attached to the 374th Maintenance Unit; that it was dispatched from the Motor Pool, and was scheduled to go to various official places. Seabourn testified that he picked up the trip ticket from Sgt. Stiles of his company; that it was common practice for trip tickets to be passed around among the men working in that section, regardless of the name of the person to whom the ticket had issued; and that this was so whether the vehicle was to be used on official business or for recreation. Schmidt testified that once a vehicle had a trip ticket, it could be used for either official business or recreation. On the other hand, Sgt. Stiles stated that the vehicle was to be used for official business only; that because the maintenance unit was on duty twenty-four hours a day the vehicle was on 24 hours dispatch and was used officially by all men in the section who had permits; that it was good on the post only.

Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable. The sovereign cannot be sued without its consent. By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the

scope of their employment which, in the case of military personnel, means acting in line of duty. To determine whether the person inflicting the injury was an employee so acting, we look to Federal law and decisions. Local law is looked to only to determine whether the act with which the person is charged gives rise to a tort liability. *United States v. Sharpe,* 189 F2d 239. So-called "permissive use" statutes are thus inapplicable and liability cannot be imposed on the United States for negligence of an employee acting outside the scope of his employment, even though the employee's activity has the express or implied permission of the sovereign agents. *Long v. United States,* 78 F. Supp. 35.

Plaintiff argues that Seabourn was acting within the scope of his employment because he was seeking entertainment; that entertainment is essential to a soldier's morale; and that proper morale is necessary to the maintenance of efficiency in the armed forces. To support her position plaintiff relies on a recent Ninth Circuit case, Murphy v. United States, 179 F. 2d 743, in which, by a two to one decision, the Court of Appeals reversed a District Court Judgment in favor of the United States. This decision, of course, is binding on this Court if the facts in the instant case fall within its framework. Unfortunately, there is one essential difference which forces the court to conclude that plaintiff's action must fail.

In the Murphy case a soldier negligently drove an army vehicle into a narrow bridge in the face of an oncoming group of pedestrians, thereby causing

one of them to fall to her death. There, as here, the sole question was whether the soldier was acting within the scope of his employment at the time. In holding that he was, the two-judge majority relied on the following facts. Twenty Air Corps soldiers staffed a radar post about three miles from the small town of Klamath, Oregon, which was their only available source of entertainment. Under the authority of the commanding officer pursuant to Army Regulations 700-105 (28), a truck was provided for nightly visits to Klamath for the men's entertainment. The pertinent Regulation provides that Army vehicles may be used by special direction of the Commanding Officer for transporting personnel in connection with authorized, organized and supervised recreational welfare and morale building activities. Once the men reached Klamath the truck was to be parked by a certain building and left there until time for the return trip. On the night in question this was not done. Instead, the driver, accompanied by another soldier, used it to drive to an Indian ceremonial dance being held two or three blocks from the center of town. The accident happened while they were en route. The District Court was reversed on the ground that the driver's recreational use of the truck for himself, after bringing the other soldiers into town, was a military employment because it was as important to the United States to maintain the morale of one soldier as of many and the Indian ceremonial would fall within the class of "authorized * * * recreational activities" as certainly as would motion picture shows or dances. The court cautioned, how-

ever, that it was here concerned only with specifically allowed amusements and that its decision did not mean that "in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment."

Clearly in the present case Seabourn was on a frolic of his own. His use of the weapons carrier was not for the purpose of transporting personnel, under the special direction of his Commanding Officer, for any purpose authorized by the Regulation, nor was it incidental to such use. On the contrary, he used it as he might his private automobile in seeking personal entertainment. This was a use contrary to the express purpose of the trip ticket and one not authorized by any of his superior officers. To hold that in so doing he was acting within the scope of his military employment would be an unwarranted extension of the terms for which even the liberal construction in the Murphy case would not be authority.

In accordance with the foregoing, therefore, it is by the court

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendant and that the respective parties bear their own costs.

Dated, June 4, 1952.

Michael J. Roche,
Chief United States District Judge.

Original Filed Jun 4 1952, Clerk, U. S. Dist. Court, San Francisco.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Althea G. Williams, Appellant, vs. United States of America, Appellee.	No. 13,707 Sep. 8, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MATHEWS, BONE and CHAMBERS, Circuit Judges

BONE, Circuit Judge.

This is an appeal from a judgment denying relief in an action under the Federal Tort Act, herein "the Act." The decision of the lower court is reported in 105 Fed. Supp. 208.

At all times here pertinent appellant was a civilian employed as a teacher by the Army Air Force, and also as a secretary by a private construction firm operating on the Island of Guam. She was injured on the night of March 3, 1949, at or about 10:30 P.M. while sitting in a vehicle then parked on a "turn-

about" place located on the end of what was called the Crystal Breakwater, this being an area on the Island reserved for "parking" purposes, and a place where cars were customarily parked.

At the time above mentioned an army vehicle then being driven by one Seabourn (a clerk in the Supply Department of the United States Army based on the Island) crashed his vehicle into the side of appellant's car, causing the physical injuries upon which this action was based. There was overwhelming evidence that Seabourn was drunk at the time.

Pertinent provisions of the Act, Title 28 U.S.C.A., read as follows:

§ 1346:

"(b) * * * the district courts * * * shall have * * * jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal injury * * * caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his office or employment, under circumstances where * * * a private person, would be liable to the claimant in accordance with *the law of the place* where the act * * * occurred." (Emphasis ours.)

§ 2671: "'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, *means acting in line of duty.*" (Emphasis ours.)

§ 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same

extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

THE QUESTION PRESENTED

Whether the United States is liable, under the terms of the Act (above quoted) for the negligent acts of a soldier which occur when the soldier is seeking personal recreation during the period he is off duty and away from his army base on a pass.

Relevant and applicable provisions of the Civil Code of Guam and Army Regulations are set forth in the margin.[1]

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[1]Section 2338 of the Civil Code of Guam provides as follows:

"2338. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

Army Regulations 700-105 (30 June 1948) provide in pertinent part as follows:

"26. Use of vehicles.—• • •

b. Motor vehicles • • • will be operated • • • only if properly dispatched on WD Form 48 (Driver's Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

• • • • • •

28. Special uses.—Motor vehicles, when available without detriment to other official business • • • may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests and supplies and equipment in connection with authorized,

THE FACTS

There was credible and competent evidence of a convincing character from which the trial court could have inferred and concluded that the facts which we here summarize were fully established as true.

Seabourn obtained an appropriate pass to leave the army base on and for the day of March 3, 1949. Accompanied by two other soldiers (Schmidt and Vincent) he spent the afternoon drinking beer. The three men returned to the base about 7 P.M. and while there, a Sergeant Stiles, a member of Seabourn's company, gave Seabourn a so-called "trip ticket" for a ¾ ton vehicle known as a "weapons carrier." This ticket had been made out about 8 A.M. that morning to a driver named Cabera,* a soldier who also worked with Seabourn and it discloses that the vehicle had been requested by a Lt. W. R. Werb, and use of the vehicle was therein authorized for "Official Business." Listed on the ticket are the various official points to which the weapons carrier was driven that

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organized, and supervised recreational, welfare, and morale-building activities.

• • • • • •

29. Motor pools.—• • •

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein."

Section 2338 of the Guam Code follows the language of a comparable section in the California Code, thereby adopting for Guam the rule of respondeat superior in force in California. It is thus "the law of the place," i.e., Guam.

*The driver's name is indicated in the text of the trip ticket as *Cabrera*. However, the ticket was signed by *Cabera*, who is obviously (there) spelling his name correctly.

day.[2] Neither Seabourn's nor Stiles' name appears on the ticket, nor was Seabourn's use of the vehicle in any way indicated thereon.

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[2] "DRIVERS TRIP TICKET AND P. M. SERVICE RECORD
2272365

Drivers Name Cabrera* Date 3-3-49
Report to Lt. Werb Time out 0810
Organization DMP Time in 1500
DEPARTMENT OR ADDRESS 374th Maintenance
KIND OF WORK OR ROUTE Official Business
REQUESTED BY Orgn, or individual Lt. Werb
/s/ Nix
Dispatchers signature

SPEEDOMETER IN	OUT	Total miles	HOUR METER in	out	Total hours
7129	7041	88	0310	0810	24

fuel added 10 gals
Oil added 0

I have performed the "preventive maintenance service of this form and recorded all deficiencies and any accident

/s/ Cabera*
Drivers signature

I have noted all entries on this form and taken necessary action

TRIP OR LOAD RECORD

FROM	PASSENGERS OR WEIGHT	SPEEDOMETER OR HOUR 7041
Motor Pool		
TO Base Supply		
TO Warehouse 1		
TO 374 Maintenance		
To Service Stock		
To Hangar 6		
To 376th Supply		
To Hq Base Squadron		

Vehicle released at 0315-7129
Official User (signature and grade)
/s/ William R. Werb, Jr. 1st Lt. USAF"

CERTIFIED A TRUE COPY
WOODROW W. JAY
Civilian Official in lieu
of Claims Officer Guam
District, Corps of Engineers
Exhibit L Report of Claims
Officer U.S.A. No. 2362773
5 April 49

By means of this "ticket", Seabourn secured possession of the vehicle and in company with the two men named drove to the Enlisted Men's Club on the Island where they drank more beer as well as some champagne, and then they decided to "go for a ride." Thereafter, and prior to the accident here involved, Seabourn let his companions out of the vehicle and drove off alone. These companions later swore that Seabourn was then "definitely drunk," and Seabourn himself swore that he remembered nothing further until the next morning when he awoke beside a road.

Seabourn's use of the vehicle while thus "off duty" and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty. The vehicle was not being used in Seabourn's "off duty" period to serve any prescribed or noted military purpose or interest of the government, nor was Seabourn's use motivated by such a purpose. His superior military authorities had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles by using the Cabera ticket which had been previously issued by Lt. Werb (see footnote 2). Nor was any military order issued by a superior officer directing or authorizing Seabourn to use the vehicle for *any purpose,* military or otherwise (including "recreation"), or for the execution of any military order.

The facts as we have outlined above are fully reflected in the record before us.

On the material issues in this case the lower court found that the accident occurred on the date, at the place and under the conditions we have noted above; that Seabourn was a corporal in the United States Army stationed on the Island of Guam and assigned to Headquarters Base Service; that he was off duty and away from the base on a pass at the time; that he and two associates spent the afternoon of the day in question drinking beer and the three men returned to the army base about 7 P.M. of the day in question where Seabourn obtained unauthorized possession of the vehicle he used, after which Seabourn, accompanied by his two companions, Vincent and Schmidt, drove the vehicle to the Enlisted Men's Club on the Island where they indulged in champagne as well as beer, after which they decided "to take a ride"; that some time prior to the accident Seabourn let both of these companions out of the vehicle, and that is all Seabourn remembered until the morning following the accident, when he awoke beside the road; that the bodily injuries of plaintiff resulted from the accident which was entirely due to the negligence of Seabourn; that Seabourn's use of the weapons carrier was not for the purpose of transporting United States Army personnel under the direction of his commanding officer, nor for any purpose authorized by army regulations; that Seabourn was on a frolic of his own and used the vehicle as he might use his private automobile in seeking personal entertainment.

On these findings the court entered conclusions of law setting forth that Seabourn, an employee of the

defendant, was not acting within the course and scope of his employment and that plaintiff is not entitled to recover from the United States, and the respective parties should each bear their own costs.

Judgment was thereupon entered in favor of the Government.

SPECIFICATION OF ERRORS

It is sufficient to say that appellant's specifications of error not only challenge all of the findings and conclusions of the lower court which are material to the issues posed on this appeal, but also the failure of the lower court to make certain proposed findings and conclusions tendered by appellant which reflect her theory of federal liability for Seabourn's tort.

APPELLANT'S POSITION

We summarize what appears to us to be the substance of appellant's contentions on this appeal:

She urges that despite the court's findings, the fact remains that Seabourn was seeking "entertainment"; that such a "diversion" is essential to a soldier's "morale," and as a (legal) consequence, his late joy ride in the army vehicle was within his "scope of employment." Relying on this theory, she sees a perfect analogy between the facts of the instant case and those discussed in our opinion in Murphey v. United States, 179 F. 2d 743, and she also assures us that the case before us narrows to a consideration of only two points which are determinative here, these

eing the facts, and this Court's views as expressed y the majority in the Murphey case.

Appellant frankly states that she is content to "rest er case" on the Murphey decision, and accompanies his concession with a lengthy discussion of the hold- ng in that case.

We disagree with appellant's contention that our ecision in Murphey v. United States, supra, when aid off against the facts revealed by the record before s, is dispositive of the vital and controlling issue n the instant case. We are fully persuaded that the Murphey case is clearly distinguishable on the facts. There we pointed out that Sergeant Brander drove n army truck to the town of Klamath under *specific uthorization* of his commanding officer. He was uthorized to take it into the town "for pleasure," *nder instructions* that it might be used to carry some oldiers into the town "for entertainment, movies, tc." The majority of this Court thought that the fficial permission thus granted was broad enough to *nclude* a visit to an Indian dance (certainly in itself harmless diversion) being held only a short distance utside the town, this because Brander's "digression" o the place of the dance was with "knowledge of his] superior officers." The basic assumption on ur part was that attending the dance was within he concept of allowable "recreation" *because* it was or "entertainment, movies, etc." Brander's com- manding officer testified that "it was supposed that he truck would be parked alongside a building in he town until it was to be returned to the army amp."

Brander was negligent in his driving but it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence.

The accent in the Murphey opinion is on *recreational use* of the army vehicle for "improvement of Brander's morale" and the majority of the court found support for this interpretation of "recreation" in an opinion of the Judge Advocate General that "engaging in *allowed athletic exercise*" is within a soldier's "line of duty." Then we proceeded to find a suitable analogy in an Admiralty case holding that in seeking allowed recreation, a seaman "was in the course of his maritime employment" when after going ashore, *he injured himself* while diving into a shallow swimming pool. No cases in the field of Admiralty are cited (and probably not one could be found) which support the view that a ship could be held legally liable in damages to a civilian who was the victim of a wholly independent tort committed against his person by a sailor while the latter was "recreating" ashore on leave from his ship.

As the Admiralty case we cited points out, shore leave for a seaman is an old part of the business of sailing ships. The present day *status* of a sailor has also preserved his traditional right (as a ward of admiralty) to "cure and maintenance." Even this ancient right is lost when his voluntary misdeed is the active cause of his physical disability or sickness. And certainly the historical legal status of a sailor is far removed from the military status of a soldier.

In the Murphey case we carefully delimited the area of federal liability by the frank and illuminating statement that:

"This case concerns specifically allowed amusements, here 'movies, etc.' in the town of Klamath. *We are not holding that in any case where a soldier is on a frolic of his own he can make the government liable simply because he there found entertainment.*

"We think the *overriding purpose* in Brander's employment in the use of the truck in the town of Klamath *is the improvement of the morale of the soldiers in seeking 'entertainment.'* The 'movie, etc.' certainly would include the Indian ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instruction that he was not 'free' to use it in a particular manner accomplishing that purpose.

* * * * * * * *

"Here Brander was seeking *the specified entertainment* which would *improve his military morale.* That he was 'directly or indirectly serving his master' in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the ceremonial." (Emphasis ours)

And we again emphasized the significance of such a holding in language used in United States v. John-

son, 181 F. 2d 577 relative to the conduct of a driver of a navy vehicle. We specifically referred to the *absence* of evidence showing that the driver was "on a frolic of his own" at the time of the accident there involved. There this Court considered the case of a civilian in Guam who was injured when a navy vehicle in which he was riding overturned. The driver of the vehicle was a navy pharmacist's mate. Our ultimate holding was that the doctrine of res ipsa loquitur was applicable, because the vehicle suddenly started to "shimmy" and quickly rolled off the road. Upon the assumption that this unexplained action of the vehicle (wholly within the control of the navy) spelled out careless inspection or construction (careless or "drunk driving" of the vehicle at the time was not evident) we applied the res ipsa loquitur doctrine and held the Government liable under the Act.

Under the facts in the Johnson case (also relied on by appellant) we also held that the driver was on official navy business at the time (and therefore "acting in line of duty") despite some "deviations" (for personal errands) from what would have been a normal time and route in delivering a navy report. We refused to accept the argument that these slight "deviations" indicated (in a legal sense) that the driver had (thereby) departed "on a frolic of his own." This case is also clearly distinguishable from the facts in the Murphey case and the facts in the case at bar.

Appellant also argues that in Murphey we held that an employer is held liable for "incidental" acts

which he should reasonably have expected would be done though the particular act "be forbidden, or done in a forbidden manner," to which is added the assertion that this Court "emphasized that the superior officers knew that the truck was employed for such [forbidden] purposes," and that Brander's activity "directly or indirectly served the master," and were thus "within the scope of the employment." We are reminded by appellant of our reference to the "paramount significance of morale in military life," this *morale* to be achieved by *recreational activity.* And because *such activity* is authorized in Army Regulations, the employer is rendered responsible *under the Act* for the resultant negligence of the employee, this by application of the respondeat superior doctrine to this case as this doctrine is applied under California law to the "master and servant" relationship in the field of private employment. This emphasis justifies comment since both parties stress the doctrine in their briefs because of its assumed bearing on the crucial issue before us.

THE RESPONDEAT SUPERIOR DOCTRINE

Appellant's stress is on decisions of the California state courts where it was applied in cases involving the ordinary "master and servant" relationship in purely private employment. In none of the California cases cited does a court discuss (as indeed it could not) the question of *federal liability* for the tortious acts of a soldier.

The *status* of a soldier or sailor in military or naval service is quite different from the *status* of either an

employee serving a private employer or a civilian employee serving the United States, a fact which requires emphasis because of its importance in the case at bar.

The novel *status* of a soldier arising from his peculiar relationship with his Government, was clearly pointed up by emphatic language of the court in United States v. Standard Oil Co. of California, 332 U.S. 301, 305, 306, 309, 310. That decision merely brought into sharp focus the controlling legal and constitutional factors underlying such a unique relationship. Congress did not lose sight of this obvious fact while considering the many problems wrapped up in the national defense program in connection with its surrender of immunity to suit under the Act. As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was "acting in line of [military] duty." This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical "master and servant" cases where the rule of respondeat superior is normally applied.

Comments of the court in Feres v. United States, 340 U.S. 135, 138, 141, 143, are pertinent as bearing on the peculiar status of a soldier. And see United

States v. Sharpe, 189 F. 2d 239, 241, where the court indicates that when a question of statutory construction of federal legislation is involved, federal courts are not bound by local decisions but apply their own standards—this with respect to determining the relationship of the Government to its employees.

On its face the Tort Claims Act appears to be a general act designed to cover all sorts of claims against the United States for money damages for tortious injuries to persons and property caused by the negligent or wrongful act or omission of any Government employee "while acting within the scope of his office or employment."

At first blush, some broad preliminary language in the Act would seem to embrace *all categories* of Govment employees and servants (even including members of the military and naval forces of the United States) and serve to bring them and the United States within the orbit of the orthodox respondeat superior doctrine as applied under "the law of the place" where the tortious act was committed. But this view of the meaning of the Act is completely dissipated by an inspection of its full terms. It would do violence to reason to assume that Congress did not recognize the fact that a vast number of purely *civilian employees* are on the Government payrolls, and one of its obvious purposes was to bring these employees within the orbit of the Act. While we are not here concerned with the tort of a civilian employee of the Government, the *status* of such an employee (under the Act) becomes a matter of im-

portance when the question of federal liability for his tortious act is involved. A most casual reading of the Act will make this fact very plain, and in this connection it may be assumed that as to such civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace "master and servant" cases, would apply.

But in dealing with the problem of federal liability for tortious acts of *members of the military and naval forces* a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this "master and servant" doctrine. By carefully chosen language it delimited the area of federal liability for tortious acts of members of this group by specifically providing that so far as concerns such acts, the phrase "acting within the scope of his office or employment" shall *mean* "acting in line of duty." By use of such plain, unambiguous and highly significant language, Congress made abundantly plain that federal liability can arise *only* when the tortious act was committed at a time when the tort feasor member of our military or naval forces was actually "acting in line of duty." Unless we are prepared to utterly disregard this mandate and refuse to conform to its obvious meaning, we must (as we do in this case) hold that "acting in line of duty" means *acting in line of military duty.* If Seabourn was not acting in line of *military* duty at the time he injured appellant, the rule of respondeat superior (as applied in orthodox "master and servant" cases) loses its standardized

force for that rule has been modified in the significant manner here noted. We need not stress the fact that when the sovereign waives its immunity from suit, it may, as here, do so *on its own terms.*

And as appellee points out, appellant cites no authority for the theory that a private employer could be held liable in damages for the tortious act of an employee occurring on an allowed "day off" while he is out driving on a joy ride while drunk.

In stating her position on the issues, appellant asserts that since (under Army Regulations) a soldier may indulge in "recreation," his "off duty" recreational activities are properly to be regarded as within the scope of his "military duty." The assumption necessarily underlying this contention is that Seabourn *was actually indulging in an authorized and permissible form of "recreation"*[3] at the time he crashed his army vehicle into appellant's car. Upon no other basis can her position be sustained unless we close our eyes and agree that a loose post "practice" of "passing around" trip tickets issued only for *official use,* (when the actual use is not for official business) in some undisclosed way transformed the use by Seabourn into an authorized "official use."

The loose operation of "passing around" among enlisted men "tickets" which would give them possession of an army vehicle for joy riding and drinking

[3]We do not look to a dictionary definition of the word "recreation" as determinative, for the unchallenged Army Regulations must govern the meaning of the term since they define "recreational activities" in which army personnel may engage.

bouts, all without the knowledge or approval of their superior officers, finds no sanction in applicable Army Regulations, but to the contrary, is a clear violation of these rules.

A look at the regulations (footnote 1) will reveal that they refer only to authorized athletics, organized and supervised recreational welfare, and morale-building activities. Every recreational activity mentioned in the regulations is a far cry from a wild, reckless and wholly independent act of violence against a civilian, and we are unwilling to give sanction to appellant's basic theory that irresponsible drunkenness and irresponsible driving late at night on a "lark" or "frolic" in a wholly independent venture entirely unrelated to what we conceive to be "acting in line of duty," must be regarded by us as "recreational" conduct authorized by Army Regulations. But appellant's view is, that Seabourn's night ride while drunk was a morale-builder, hence the government is liable in damages for the tortious act resulting from that exploit.

Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; that he was then drunk and in an irresponsible mood; that he was not then executing any military order or on military business of any kind. And if resort be had to the California cases cited in our Murphey opinion which deal with the liability of a private employer (under the respondeat superior doctrine) we suggest that it would bankrupt the most exuberant imagina-

tive powers to envision Seabourn's criminal conduct as an activity which a private employer "should reasonably have expected would be done," or that such conduct was "serving his master".

There is a further consideration of vital importance. If there was not some rational limitation on so-called "recreational activities" such as those that led to the accident here involved, the Government could be held liable in damages for every wholly independent wrongful act of a soldier while he is away from the burdens of his official army duties on a "pass" despite the fact that such acts might range through the entire category of personal and property torts having no conceivable connection with the performance of any known military duty, and certainly not within the scope of any allowable and rational "recreational activities" referred to in the Army Regulations. The short of it is that a "right" to "recreate" does not carry with it a correlative right to "keep up morale" by negligently or wilfully destroying the rights of others (in activities wholly apart from permissible recreational sports and relaxation) and thereby fasten upon the Government a financial liability for such tortious acts.

Appellee has cited certain cases thought to be apposite which bear on the question whether Seabourn was "acting within the scope" of his "office or employment" when he injured appellant. They concern activities which have relation to appellant's basic premise that since "entertainment" is essential to a soldier's "morale," Seabourn's joy ride was not only

within the legitimate scope of his employment, but (under our Murphey decision) must be regarded as an activity which was in line of "military duty." A brief reference to some of these cases is justified.

A case presenting a situation somewhat comparable to one in the case at bar is King v. United States, 5-Cir., 178 F. 2d 320, cert. denied 339 U.S. 964.

The "line of duty" language was used to "more correctly" describe the conduct of military personnel in acting for the Government. United States v. Eleazer, 4-Cir., 177 F. 2d 914, 918, cert. denied 339 U.S. 903.

"Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior." United States v. Campbell, 5-Cir., 172 F. 2d 500, 503, cer. denied 337 U.S. 957, where the "line of duty" argument is considered.

The Supreme Court has stated that while on leave, a soldier "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him." United States v. Williamson, 90 U.S. 411, 415.

The "leave" is a favor extended "for his sole accommodation" to permit him to "enjoy a respite from military duty." Cf. Foster v. United States, 43 Court of Claims, 170, 175. And see Hunt v. United States, 38 Court of Claims, 704, 710.

When a soldier is "off duty" his conduct is "subject to the control of no one but himself." United States v. Sharpe, 4-Cir., 189 F. 2d 239, 240, 241; United States v. Eleazer, supra, p. 916; and see United States v. Williamson, supra.

And the application of the doctrine of respondeat superior can no more suffice to make the Government responsible for the negligence of a soldier who is absent from his post of duty on a pass than it would suffice to impose liability for the acts of a soldier while AWOL. See United States v. Sharpe, supra, p. 241.

When he is off duty, he is "on his own." Rutherford v. United States, 73 Fed. Supp. 867, 868, 869, affirmed per curiam in 168 F. 2d 70, 6-Cir. A navy petty officer was here involved. Holding was that this enlisted man was not "acting within the scope of his office or employment" unless he was "acting in line of [naval] duty" at the time of the accident.

The above noted cases cited by appellee serve to lend emphasis to the views we have expressed.

We have examined the entire record with care and being convinced that a proper result was reached by the trial court its judgment must be, and is, affirmed.

CHAMBERS, Circuit Judge, concurs in the result.

(Endorsed:) Opinion and Concurrence. Filed Sep. 8, 1954. Paul P. O'Brien, Clerk.